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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2018-CP-40-02545
Appellate Case No. 2020-000067

Dr. Kaoru Pridgen .... Appellant

v.

Colonial Family Practice, LLC, Varsity Family Care Partners, LLC, Family Care Partners d/b/a Family Care Partners Management, LLC, Dr. Clay Lowder, Thomas W. Watson, and Dr. Gary R. Katz .... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. WHETHER SUMMARY JUDGMENT WAS IMPROPERLY GRANTED TO DISMISS ALL CLAIMS AGAINST VARSITY FAMILY CARE PARTNERS, LLC?

II. WHETHER THE COURT ERRED BY GRANTING SUMMARY JUDGMENT FOR PLAINTIFF'S CLAIMS FOR BREACH OF CONTRACT, BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT, NEGLIGENT MISREPRESENTATION, AND PROMISSORY ESTOPPEL?

STATEMENT OF THE CASE

Appellant Dr. Kaoru Pridgen ("Appellant", "Plaintiff", "Dr. Pridgen") filed this lawsuit on May 9, 2019, asserting claims of (1) sex discrimination in violation of Title VII of the Civil Rights Act ("Title VII"), (2) violation of the Equal Pay Act ("EPA"), (3) breach of contract, (4) civil conspiracy, (5) negligent misrepresentation, (6) breach of contract accompanied by a fraudulent act, and (7) promissory estoppel. (*See* R. pp. 60-78; *see also* R. pp. 109-126). Respondents deny these allegations. (*See* R. pp. 79-96; 97-106; 127-136; 137-150; 257-258; 263-264).

Respondent Colonial Family Practice, LLC ("Colonial Family Practice") is medical practice that employed Dr. Pridgen as a physician. (*See* R. pp. 109-126). Respondent Varsity Family Care Partners, LLC ("Varsity") is a legal entity legally affiliated and/or legally related to CFP. (Id.). Respondent Family Care Partners d/b/a Family Care Partners Management, LLC ("Family Care Partners") is a legally entity legally affiliated and/or legal related to CFP. (Id.). Respondent Dr. Clay Lowder ("Dr. Lowder") is a physician and a partner actively involved in the management of the practice. (Id.). Respondent Thomas W. Watson ("Watson") was the CEO over the practice. (Id.). Respondent Dr. Gary R. Katz ("Dr. Katz") is a physician and was the Chief Medical Officer over the practice. (Id.).

On November 13, 2018, this case was assigned to the Business Court for Richland County and the Honorable Clifton Newman was given exclusive jurisdiction over the case. The Parties engaged in discovery during the later part of 2018 and in 2019.

On July 16, 2019, Colonial Family Practice, Family Care Partners, Dr. Lowder, and Watson (collectively the "Colonial Defendants") filed a Motion for Partial Summary Judgment. (R. pp. 265-283). In summary, the Colonial Defendants sought summary judgment as to claims based on contractual and verbal agreements that Dr. Pridgen would obtain an ownership interest in the

practice. (Id.). On November 15, 2019, the hearing for the Colonial Defendants' Partial Motion for Summary Judgment was scheduled for December 5, 2019. Dr. Pridgen filed a memorandum in opposition to the Colonial Defendants' Motion on December 3, 2019. (R. pp. 342-368).

On August 30, 2019, Varsity filed a Motion for Summary Judgment. (R. pp. 316-317). In summary, Varsity sought summary judgment on all claims. (Id.). On November 15, 2019, the hearing for Varsity's Motion for Summary Judgment was scheduled for December 5, 2019. Dr. Pridgen filed a memorandum in opposition to Varsity's Motion on December 3, 2019. (R. pp. 369-398).

A summary judgment hearing was held on December 5, 2019. (R. pp. 153-256). Oral arguments were held in Richland County before Judge Newman. (Id.). Judge Newman took matters under advisement and did not rule on any issues from the bench. (Id.).

On December 20, 2019, the Court issued two Orders. (R. pp. 7-34). The Order granting the Colonial Defendants' Motion for Partial Summary Judgment was concluded as follows:

> 1. As to Plaintiff's claims for breach of contract (third cause of action) and breach of contract accompanied by a fraudulent act (sixth cause of action):
>
>   a. Summary judgment is granted to FCP Management, Varsity, Lowder, Watson, and Katz, as these defendants are not parties to the Agreement.
>
>   b. Summary judgment is granted as to Colonial because (i) Plaintiff has no contractual entitlement to an ownership interest in Colonial based on the plain and unambiguous language in Paragraph 15 of Plaintiff's Agreement; (ii) there were no enforceable verbal modifications of the Agreement; and (iii) the alleged promise that Plaintiff would become an owner of Colonial is too indefinite to be enforced.
>
> 2. Summary Judgment is granted to Defendants as to Plaintiff's claim for negligent misrepresentation (fifth cause of action) because the underlying representation that Plaintiff would be made an owner of Colonial in the future is merely an unfulfilled promise or statement of future event, which is not enforceable as a matter of law.

3. Summary Judgment is granted as to Plaintiff's claim for promissory estoppel (seventh cause of action) because there were no enforceable verbal agreements or promises that Plaintiff would be made an owner of Colonial.

> Plaintiff's claims for gender discrimination in violation of Title VII (first cause of action) against Colonial, FCP Management; violation of the Equal Pay Act (second cause of action) against Colonial, FCP Management; and civil conspiracy (fourth cause of action) against Lowder and Watson, are not addressed by the Colonial Defendants' Motion for Partial Summary Judgment and are therefore not affected by this Order.

(R. pp. 16-17). In a separate Order, the Court also granted Varsity's Motion for Summary Judgment on December 20, 2019, thereby dismissing Varsity from the case with prejudice. (R. pp. 20-34).

Appellant timely filed her Notice of Appeal on January 16, 2020. This matter is before the Appellate Court upon Dr. Pridgen's appeal of both Orders issued on December 20, 2019.[1]

FACTUAL BACKGROUND

Dr. Pridgen is a female physician practicing medicine in South Carolina. (R. p. 1224, line 16). Dr. Pridgen had a fully functioning solo practice of medicine for several years prior to her employment with the entity defendants. (R. 1097, line 16 – p. 1098, line 15). Dr. Soto, a physician and partner of the practice, Dr. Lowder, a physician, partner, and manager of the practice, and Lissa Lara ("Lara"), the former CEO of Colonial Family Practice, began soliciting Dr. Pridgen to join Colonial Family Practice in 2012. (R. p. 1892, line 21-p.1893, line 4)[2], (R. p. 1066, line 12-p.

[1] The next day after the December 5, 2019 summary judgment hearing, Defendant Watson filed a Second Motion for Summary Judgment, Defendant Varsity filed a Second Motion for Summary Judgment, Defendant FCP filed a Second Motion for Summary Judgment, Defendant Lowder filed a Second Motion for Summary Judgment, and Defendant CFP filed a Second Motion for Summary Judgment. These numerous dispositive motions are still pending. Contemporaneously with filing her Notice of Appeal, Appellant filed a Motion to Stay the Case on the grounds that many of the issues pending determination in the case could be impacted by this appeal to the South Carolina Court of Appeals filed January 16, 2020.

[2] Transcript of Dr. Clay Lowder from May 22, 2019.

1070, line 22). In June 2013, Dr. Pridgen merged her practice with Colonial Family Practice after a year of negotiations. (R. p. 1136, lines 3-6). Dr. Pridgen brought a fully functioning practice, with staff, a fulltime patient base, as well as approximately twenty-five thousand dollars' worth of medical equipment. (R. p. 1098, lines 9-21). Dr. Pridgen is the only physician to join the practice with such patients and equipment. (R. p. 1448, line 12 - p. 1450, line 8). The most vital aspect of the negotiations was the ability for Dr. Pridgen to become a partner in Colonial Family Practice, which was specifically promised by Dr. Lowder and Lara, both before and after Dr. Pridgen's contract was signed, as an inducement to Dr. Pridgen's joining the practice. (R. p. 3108; R. p. 1068, lines 3-6; p. 1080, lines 7-14; p. 1088, lines 3-8; p. 1089, lines 18-21; p. 1090 lines 1-7) ["Clay offered me partnership as an enticement for me to bring my practice."]; p. 1092, line 9 - p. 1093, line 18; p. 1096, lines 18-24; p. 1133, lines 3-6). Dr. Lowder and Lara further promised that Dr. Pridgen's opportunity to purchase an ownership interest would be moved up in time and occur at eighteen months of employment. (R. p. 1448, line 12-p. 1450, line 8).

A written agreement for Dr. Pridgen to obtain partnership exists between Dr. Pridgen and Defendants with additional contractual commitments, promises, and actions related to partnership following the execution of the written agreement. (R. p. 2552-2567; see also R. p. 1080, lines 4-6; p. 1099, line 25 - p. 1100, line 10). The agreement between Dr. Pridgen and Defendants, in relevant part, reads as follows:

> 15. Membership Interest Purchase. , At the end of the thirty-six (36th) month of employment, both Employer and Employee agree that consideration will be given to permitting Employee to purchase a membership interest in Colonial Family Practice, LLC ("LLC") at the end of the third (3rd) year of employment, or at other such time as agreed to by the parties. If employee desires to become a member of Employer and the member(s) of Employer agree(s), Employee will then acquire a membership interest and this Agreement will be terminated by consent. The purchase price, percentage amount, and

> remaining terms of such buy-in and the method of payment shall be determined at the time of buy-in.

(R. pp. 2552-2567).

To date, Dr. Pridgen is not a partner at Colonial Family Practice.[3] All the partners of the practice are male. (R. p. 1800, lines 10-12). Dr. Pridgen observed comparable male doctors, including Dr. Baker, Dr. Soto, and Dr. Stewart, receive partnership with the practice without having to meet additional standards or other criteria after a three-year tenure with the medical practice. (See R. p. 1918, lines 3-5). Dr. Pridgen is[4] paid less than the male partners. (See R. pp. 3104-3107; see also R. pp. 2850-2968; R. pp. 2452-2532; R. pp. 2533-2551; R. pp. 2370-2451.

In January 2016, Dr. Lowder called Dr. Pridgen to inform her that Colonial Family Practice would be merging with Varsity Healthcare Partners an entity operating several medical practices. (R. p. 1112, line 11-p. 1113, line 25). Dr. Lowder assured Dr. Pridgen that she would still become a partner in the practice in a partnership meeting to occur in September 2016 and that there would be no change in her status, including salaries, scheduling, and management. (R. p.1112, line 11-p. 1113, line 25 ["You're still up for partnership if you want it. Nothing is going to change."]; R. p. 3103). When Varsity Healthcare Partners and Colonial Family Practice merged legal and financial interests, they also created a holding company called "Family Care Partners." (R. pp. 3000-3081).

Each of these companies are intertwined. (R. pp. 3000-3081). Varsity received substantial and complex control over the operations of the medical practice as a result of the acquisition and

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[3] Colonial Family Practice made the decision to exercise its right pursuant to Paragraph 13(c) of the Employment Agreement to waive the remainder of the 90-day notice of termination period and end Dr. Pridgen's employment immediately on May 1, 2020.

[4] Until May 1, 2020, when Colonial Family Practice terminated the employment contract with Dr. Pridgen.

merger. (R. pp. 3000-3081). Every deponent who has testified in this case has testified to Varsity's control and intertwined nature of the entities. Watson testified that:

> A…I wasn't the decision maker. The chief medical officer and the board would have been, not me.
>
> Q. And you were on the board?
>
> A. I was on the board, but I didn't have the controlling voting rights. I could have said whatever I wanted, it wouldn't have mattered.
>
> Q. And who do you consider to have the controlling voting rights?
>
> A. Varsity had controlling voting rights on the board.

(R. p. 1668, line 18 - p.1669, line 2). Dr. Soto, who is one of the partners, testified as follows:

> A. When Varsity bought us, we had no say or at least I felt like we had no say, so no.
>
> Q. Have you personally ever sought to take action towards Dr. Pridgen becoming a partner?
>
> A. It wasn't my place to do anything. I couldn't make decisions on anything. I don't think it mattered if I would have done anything.
>
> …
>
> Q: If you're not the decision marker, who do you attribute the decision maker to be with regard to Dr. Pridgen becoming partner?
>
> *Objections from Defense Counsel
>
> A: The decision makers, I guess at that moment, I can't remember if Tom Watson was still there, which was representing probably Varsity, And -- and the CEO for the Family Care Partners at that time, I would think that he would probably would be the one to make decisions. Honestly, I don't even know who would make decisions. Dave Alpern? I don't know if Dave Alpern had anything to do with it. I don't really honestly don't know. All I -- when we went to the -- to meetings with them, it was informative, it was never to ask me questions, what did I think or, you know, what to do.
>
> Q. And describe for me the meetings that you're referring to in that last response.

> A. The meetings were whatever they had a -- meetings for us to come and find out what was happening with the practice.
>
> Q. Who is the "they" that you're referring to in your testimony?
>
> A. I guess whoever was in charge of Family Care Partners at the moment.
>
> Q. Who do you believe was in charge of Family Care Partners at the time of those meetings?
>
> Varsity Objection
>
> A. The Varsity people and Clay Lowder.

(R. p. 2198, line 3 - p. 2200, line 4). Dr. Soto described that the practice was sold to Varsity and that Varsity controlled the business. (R. p. 2200, lines 1-25; p. 2205, lines 1-2; p. 2215, lines 12-19). When asked how he found about that Dr. Baker, a male physician comparator to Dr. Pridgen, was becoming a partner, Dr. Soto answered "That was during the time of Varsity so I guess Varsity announced that they were going to allow him to become a partner, but that's probably all I can tell you."[5] (R. p. 2226, lines 22-25). Dr. Lowder's testimony is much the same. (See R. p. 1781, line 14 - p. 1792, line 23; p. 1825, line 9 - p. 1829, line 19; p. 1841, line 11 - p. 1842, line 24; p. 1844, line 5 - p.1846, line 18). Dr. Lowder described it as follows:

> Q. From the transaction with Varsity, what benefit did the partners of Colonial receive?
>
> A. What do you mean "benefit"?
>
> Q. Financial in nature?
>
> A. Yeah. Well, they kind of purchased part of our practice and like -- they purchased like 61 percent of our practice. I'm sorry, they purchased the whole practice, and then we rolled back 39 percent.

---

[5] If the physician partners with an ownership interest in the medical practice do not even know who makes such decisions, it seems unjust that the Court should fault the non-moving party, Dr. Pridgen, for being equally baffled by the legal sheltering the entity defendants created seemingly for financial and legal sheltering purposes. (See R., p. 26).

> I'm a doctor so I don't know financial, but they ended up owning 61 percent and we owned 39 percent, the partners did.

(R. p. 1845, lines 15-25).

> Q. Which doctor is the most recent that has -- at Colonial that has been designated as a partner?
>
> A. I can't remember which one was last, Dr. Katz or Dr. Baker.
>
> Q. When Dr. Katz and Dr. Baker became partners, was there a vote?
>
> A. I don't remember.
>
> Q. When Dr. Katz and Dr. Baker became partners, who were the decision-makers?
>
> A. I guess the board. I guess Dave Alpern and Tom Watson and the board.
>
> Q. And I think you've identified Dave Alpern as the chairman. What was Tom Watson's role at the time of that decision-making?
>
> A. He was the CEO.
>
> Q. Would that be of Varsity?
>
> A. I think he was CEO of Family Care Partners.

(R. p. 1789, lines 2-18).

Varsity also became responsible for the execution of the existing employment contracts for the employees of the medical practice, such as Dr. Pridgen because of section 8.1.4 of the Acquisition Agreement which reads as follows:

> Buyer shall be responsible for the payments and benefits to be provided to Continuing Employees in accordance with Section 8.2, and continuation coverage for Continuing Employees in accordance with Section 8.2, as well as any other potential liability relating to any discontinuation of the employment of any Continuing Employee on or after the Closing.

(R. pp. 3000-3081). This is further established in the Management Services Agreement and the Membership Interest Control Agreement effective December 22, 2015. (R. pp. 2591-2849; R. pp. 3082-3092).

Varsity employs a variety of people, each using Varsity email addresses including Dave Alpern ("Alpern"). (R. pp. 3638-3697). Varsity employees include, but are not limited to:

- David Alpern, DA@varsityhealthcarepartners.com;
- Michael Jablon, MJ@varsityhealthcarepartners.com;
- Kenton Rosenberry, KR@varsityhealthcarepartners.com;
- Steven Boyd, SKB@varsityhealthcarepartners.com;
- Narissa Reed, NR@varsityhealthcarepartners.com; and
- Amy Maser, AM@varsityhealthcarepartners.com.

(R. pp. 3638-3697). Varsity made publications describing the history and credentials of their employees. (Id.).

Alpern exchanged emails with Dr. Lowder, Watson, and Dr. Katz in which Alpern gave specific instructions for the action to be taken by the medical practice in regard to granting Dr. Baker an opportunity to purchase partnership. (R. pp. 2568-2590; pp. 3722-3799). Alpern, a Varsity employee, made specific statements about who Varsity would and would not permit to purchase partnership including "equity is reserved for our key players who are both productive in dollar collections and 'influencers.'" (R. p. 3726). Alpern also stated that the issue of whether or not an M.D. would be granted an opportunity to purchase partnership was a problem that "we [Varsity] can solve." (R. p. 3728). Varsity also maintained records related to Dr. Pridgen's employment. (R. p. 3666; p. 3670). Varsity further sought to employ doctors, such as Dr. Pridgen, as it maintained documents related to its "recruitment" and "acquisition" of other doctors. (R. pp. 3676-3696).

In March 2016, Dr. Pridgen met with Tom Watson, the former Chief Executive Officer of Family Care Partners. (R. p. 1118, line 25 - p. 1120, line 7). Watson has also self-identified as a

Varsity employee on his professional LinkedIn profile page. (R. pp. 3113-3622). Dr. Pridgen explained to Watson that she would like to start the buy-in process for partnership in order to be become a full partner by September 2016. (R. p. 1118, line 25 - p. 1120, line 7). Watson told her that he needed an additional month to discuss it with the proper parties to make that decision. (R. p. 1118, line 25 - p. 1120, line 7). At the same time, Defendants had begun to develop a scheme designed to create shifting patient per month requirements to block Dr. Pridgen's opportunity to purchase partnership, requirements which have never been imposed on male potential partners. (R. pp. 3722-3799). These requirements were imposed on Dr. Pridgen, yet Dr. Lowder, Dr. Katz, Watson, and Dr. Soto have all confirmed in their testimony that no requirements for partnership have ever been formally confirmed. (See Depositions produced herewith, i.e. R. p. 1554, line 20 - p. 1555, line 4).[6] Even with such shifting requirements, Dr. Pridgen met the arbitrary thresholds imposed on her, with the exception of the month when Dr. Pridgen's multi-week honeymoon took place. (R. pp. 2969-2983).[7] In April 2016, Dr. Pridgen followed up with Watson and Dr. Lowder, reiterating her desire that the promises for partnership be fulfilled. (R. p. 1119, line 20-p.1120, line 7; p. 3103).

---

[6] Q. And what barriers, if any, were there to Dr. Pridgen becoming a partner?

A. Well, so the first was, I think, when she and I talked, she was not at the membership, you know, the most basic thing, she wasn't hitting the -- the patient count per month, which was not necessarily all that well defined either. That was sort of in flux. Somewhere around the 500 level. But I think we were trying to set it higher than that.

[7] May 2016 - 648 visits, June 2016 - 701 visits, July 2016 - 635 visits, August 2016 - 646 visits, September 2016 - 339 visits (honeymoon), October 2016 - 635 visits, November 2016 - 621 visits, December 2016 - 650 visits, January 2017 - 811 visits, February 2017 - 665 visits, March 2017 - 1015 visits, April 2017 - 782 visits, May 2017 - 781 visits, June 2017 - 765 visits, July 2017 - 630 visits.

On July 22, 2016, Dr. Pridgen again met with Watson. (R. p. 1121, lines 19-22). There are several key points in the recording between Watson and Dr. Pridgen on July 16, 2016. The following are key points of the promises made to Dr. Pridgen during the recording:

- At around 15:50[8], Watson informs Dr. Pridgen that Dr. Lowder informed him that Dr. Lowder and Dr. Pridgen had talked.
- At around 16:15, Dr. Pridgen confirms that Dr. Lowder had told her "that we are going to offer you partnership." Then, there is discussion about the numbers for patients seen per month.
- At around 17:00, Watson asks, "You saw my criteria, right?" They are looking at a physical document with the doctor's patient numbers.
- At around 17:59, Watson says, "This is where you are. You can see where the 550 comes from. Stewart is lagging."
- At around 19:35, Watson says "We haven't quite figured out what the quality criteria is going to be... **You'll probably be in under the deck before this happens**."
- At around 22:18, Watson asks "So you're all in? Are you totally serious? Have you thought about how much you want to invest?" Dr. Pridgen discusses the buy in details, "Carlos and Luke told me they have a $1 million buy in." Watson says, "There's a formula that the Varsity guys have… that Alpern has…" "to determine how that applies here."
- At around 24:40, Watson "Varsity won't exit until they've got somewhere between 3 to 5 times return on money. So that's roughly what you can expect." At around 25:10, there is also a reference to the 10 or 15 times return on the money.
- At around 25:30, Watson says that he met with Alpern the night before their meeting, which would have been on July 15, 2016.
- At around 25:42, Watson says that he told Alpern that Dr. Pridgen definitely want to buy in and there's one other doctor, Dr. Baker (who was later made partner shortly thereafter) has asked about it.
- At around 26:56, Watson says that he can give Dr. Pridgen the power point, materials, and the financials [from Paul Miller, the Chief Financial Officer] to Dr. Pridgen.

[8] These are time stamps in the recording.

- At around 33:00, Dr. Pridgen asks, "When do you expect all of this to happen with me?" Watson responds, "It's up to you. We are definitely targeting 7-1-17" and there's reference to the Varsity guys being involved and that the next steps are looking at the end of 2016.
- At around 34:36, Watson describes the value of partnership and acknowledges the benefit of Dr. Pridgen buying sooner rather than later. Watson says, "It's like a stock... It's better to buy in now... The earlier you buy in the better off you are."
- At around 34:54, Dr. Pridgen expressly states, "I don't want to wait until next year to buy in." Watson responds, "Yeah, so we're making an exception for you and another doc [Dr. Baker]. I'd love to see your volumes come up. Shoot for like the end of the year, sometime 4th quarter." Dr. Pridgen confirms, "Let's do that then."
- At around 48:22, "How much can I invest? Watson responds, "$10,000-$100,000. "In 9 months, you can invest again another $100,000." "It's cumulative."

(Watson Recording; see also, R. p. 1125, lines 7-9; p. 1614, line 5-p. 1654, line 20; p. 1655, line 5-p. 1665, line 11). Dr. Baker, a male physician, was made a partner in October 2016, whereas Dr. Pridgen was not. (R. p. 1140, lines 2-14).

On November 15, 2016, Dr. Pridgen had not heard anything about a partnership offer, and Dr. Pridgen again expressed this concern to Dr. Lowder and Watson. (R. pp. 3093-3094). Watson agreed to meet with Dr. Pridgen the next day. (Id.). The next day, November 16, 2016, Watson arbitrarily and suddenly cancelled the meeting. (Id.). Watson also text messaged Dr. Pridgen that the recommendation for partnership was up to Dr. Lowder. (Id.).

In an email from Watson to Dr. Lowder and Paul Miller, CFO, on November 19, 2016, with the subject line identifying the email as "Pridgen Tie-Off" with an importance designation as a high level of importance, Watson wrote:

> Clay, let me know your decision on Pridgen for buy-in. **My *bias* is**[9] to stick to the criteria which has 550 as the floor for the monthly visits average factor. As you know, Jess has all the detail you need in the daily file to keep an eye on her.

(R. p. 258; see also R. p. 1663, line 21-p. 1678, line 8)(emphasis added).

[9] This piece of evidence is direct evidence supporting Appellant's claims.

Through December 2016 and into January 2017, Dr. Pridgen again contacted Dr. Lowder to discuss her partnership opportunity and asked if he would further discuss it with Watson, to which Dr. Lowder responded that he would. (R. pp. 3615-3616). In early 2017, Dr. Lowder was demoted and replaced by Dr. Gary Katz as Chief Medical Officer. (R. p. 1783, line 6 - p.1784, line 4). At that time, Dr. Katz, a male, was offered an immediate buy-in and became a shareholder. (R. pp. 3098-3102). Alpern, of Varsity, made the offer of partnership to Dr. Katz. (R. pp. 3109-3112; pp. 3098-3102). Dr. Katz, while Chief Medical Officer, again promised Dr. Pridgen that she would be given an opportunity to purchase partnership. (R. p. 1226, lines 2-21). Since then, Dr. Katz's employment ended and Dr. Lowder is again the Chief Medical Officer. (R. p. 1783, line 6-p. 1784, line 4).

In May of 2017, officials from Varsity conducted a meeting with officials from Colonial and Family Care Partners in New York City. (R. pp. 3722-3799). At this meeting, Varsity officials set a course of action for the medical practice in regard to: billing, collections, M.D. communication, acquisitions, financing plans, auditing, and more. (Id.).

Since Dr. Pridgen raised concerns about the delay in her opportunity to purchase partnership into the practice, additional requirements have been added by Defendants in an attempt to impede her ability to obtain partnership at the terms she was supposed to receive as of September 2016 and per the agreement when Dr. Pridgen merged her practice with Colonial Family Practice. (R. p. 1827, line 20-p. 1829, line 11).

Dr. Pridgen has been damaged as a result of Defendant's actions. [10] (R. p. 1164, line 19-p. 1172, line 2). Dr. Pridgen has suffered a significant loss of back, current, and future income. (R.

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[10] The Court's *Undisputed Facts* section of both Orders, especially the Varsity Order, are replete with disputed facts that are directly contradictory to the legal position taken by Dr. Pridgen. For example, page 6 of the Undisputed Facts states, [t]he undisputed evidence shows that had Plaintiff

p. 1846, lines 16-18). During her employment with the practice, Dr. Pridgen has performed her job in a competent, if not more than competent manner. (R. p. 1829, line 20-p. 1830, line 3). Dr. Pridgen's performance of her job has been comparative or better than male physicians who have obtained partnership with Defendant. (R. p. 1829, line 20-p. 1830, line 3). There have never been written requirements for partnership issued to Dr. Pridgen. (See R. p. 1137, line 3-p. 1139, line 10). To date, she is not a partner.

STANDARD OF REVIEW

This is an appeal of two orders issued on December 20, 2019 granting Rule 56, SCRCP Motions for Summary Judgment. "When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) quoting *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* quoting *Turner* at 122, 708 S.E.2d at 769. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.*

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become a partner in FCP Holdings, she would have lost all of her partnership investment." (R. p. 25). To the contrary, every male physician partner practicing medicine with the practice remains a partner to date (excluding Dr. Katz who served as the CMO for less than a year and did not treat patients as a practicing physician with the practice). None of the ten male physician partners have left the profitable practice that has, over years, made them millions of dollars in personal income. Though these investment entity tools have created an image of financial loss to the practice, the fact remains that if Dr. Pridgen was a partner she would have made significantly more in income and she incurred significant losses because of the Defendants' actions. (See R. pp. 3104-3107).

ARGUMENT

1. Dr. Pridgen's Employment Agreement, A Written Contract, Was Breached.

The Court erred when granting summary judgment as to all defendants for Dr. Pridgen's breach of contract claim. There is a written contract, the Employment Agreement signed on June 11, 2013, underlying Dr. Pridgen's breach of contract claim. There is express language within the four corners of the contract that is the basis of Dr. Pridgen's breach of contract claim. Specifically, Term 15, entitled *Membership Interest Purchase*, gives Dr. Pridgen a right to become a partner of the practice. The language of the Term 15 gives Dr. Pridgen a right to consideration for partnership. The term "consideration" is not defined in the Employment Agreement. Dr. Pridgen was not the author of the contract, so any ambiguity in its terms are interpreted against the drafter, the medical practice. Dr. Pridgen's understanding of Term 15 is that she is contractually entitled to partnership. At minimum, any ambiguity in the interpretation of the contract is a jury decision.

1.1. Dr. Pridgen's Contract Is Sufficiently Definite.

The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract. *Stott v. White Oak Manor, Inc.* 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019). Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it. *N. Am. Rescue Prod., Inc. v. Richardson*, 411 S.C. 37, 378, 769 S.E.2d 237, 240 (2015).

"A contract is not unenforceable for indefiniteness because its performance is, as to particular details left open to subsequent agreement of parties, especially where contract provides guidelines for subsequent agreement." *Aperm of S.C. v. Roof,* 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986) citing, *Touche Ross & Co. v. DASD Corp.,* 162 Ga. App. 438, 292 S.E.2d 84

(1982). "For a contract to be binding… absolute certainty is not required, but only reasonably certainty." *Id.* citing 17 Am. Jur.2d *Contracts* Section 76 (1964).

The written term imbuing Dr. Pridgen with a contractual right to ownership interest in the practice is as follows:

> 15. Membership Interest Purchase. , At the end of the thirty-six (36th) month of employment, both Employer and Employee agree that consideration will be given to permitting Employee to purchase a membership interest in Colonial Family Practice, LLC ("LLC") at the end of the third (3rd) year of employment, or at such other time as agreed to by the parties. If Employee desires to become a member of Employer and the member(s) of Employer agree(s), Employee will then acquire a membership interest and this Agreement will be terminated by consent. The purchase price, percentage amount and remaining terms of such buy-in and the method of payment shall be determined at the time of buy-in.

(R. pp. 2552-2567).

Dr. Pridgen and Defendants agreed that Dr. Pridgen would be guaranteed an opportunity to purchase. (*Id*). They agreed on the item to be purchased. (*Id*). And they agreed on a time of purchase. (*Id*). As in *Aperm*, Dr. Pridgen's contract appropriately left particular details open to the subsequent agreement of the parties. *Aperm of S.C.,* 290 S.C. at 447, 351 S.E.2d at 173; (R. pp. 2552-2567). The plain, definite, and unambiguous language of the contract makes clear that Dr. Pridgen was owed an opportunity to purchase ownership interest in the practice by the end of her thirty-sixth month of employment, *at the latest.* (R. pp. 2552-2567). In context of the entire contract, the language "consideration will be given" can only mean that Dr. Pridgen was to be given an opportunity to purchase an ownership interest. (Id.). No such "consideration" has occurred to date, as required by the Employment Agreement.

The Court cited to *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 762 S.E. 696 (2014) in support of a proposition that "a binding and enforceable contract is not formed

if the parties contemplate that something remains to be done to establish arrangements or if elements are left for future arrangement." (R. p. 15; see also R. p. 278). The Court's interpretation of *Stevens & Wilkinson* goes well beyond the actual holding of the case. *Stevens & Wilkinson,* 409 S.C. 568, 762 S.E. 696. The contract in question with *Stevens & Wilkinson* was held too indefinite because the "contract" at issue was simply a signed statement of intent to later enter into a wide variety of complex large-scale construction and development contracts. *Id.* This is not comparable to Dr. Pridgen's contract, and as such is an impermissible basis for the determination of this issue.

The Court's finding of indefiniteness effectively asserts that the term at issue was only included to state that the current partners would *think about* giving Dr. Pridgen an opportunity to purchase an ownership interest. (emphasis added). The Court's interpretation holds the entire fifteenth term of the contract without effect. Such an interpretation is against established contract interpretation principles. *See, Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Documents will be interpreted so as to give effect to all of their provisions, if practical.").

At worst, the contract is ambiguous. A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. *N. Am. Rescue Prod. Inc. v. Richardson*, 411 S.C. 37, 378, 769 S.E.2d 237, 240 (2015). When a contract is ambiguous, the issue then turns to determining the intent of the parties in the drafting of the terms. *Laser Supply Services, Inc. v. Orchard Park Associates,* 383 S.C. 326, 334, 676 S.E.2d. 139, 144 (Ct. App. 2009). Such a determination of the intent of the parties is an issue of material fact, and as such it is most appropriate for a jury to determine; thus, a grant of summary judgement should not be allowed to stand. *Id.,* 383 S.C. at 334, 676 S.E.2d. at 144.

1.2. <u>All Defendants Are In Privity.</u>

The Court ruled that each non-Colonial Defendant is not in privity of contract with Dr. Pridgen. This is ruling is contradictory to the facts of this case and the law of South Carolina, and as such should be reversed.

1.2.1. <u>The Individual Defendants Are In Privity.</u>

Courts have long recognized that the guise of corporation cannot be used to protect individuals from fraud. *Pertuis v. Front Roe Rest., Inc.* 423 S.C. 640, 655, 817 S.E.2d 273, 282 (2018) ("when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons") quoting *Drury Dev. Corp. v. Found. Ins. Co.,* 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008). In this case, the Individual Defendants each made repetitive promises to Dr. Pridgen that she would receive the opportunity to purchase an ownership interest in the practice as required by written contract. (R. pp. 3615-3622; R. pp. 3093-3094; Watson Recording 34:56). The Defendants knew that these promises were false at the time in which they were made as evidenced by their tactics to delay and obstruct the fulfillment of these promises. (See R. pp. 3093-3094). The Defendants knew that Dr. Pridgen was ignorant of their fraud, as they were the only individuals capable of knowing that the statements were false. Dr. Pridgen was justified in relying on the financial promises from the executives of the practice, and her reliance ended in her own financial detriment as she was denied the profits of partnership. To not hold the Individual Defendants liable for their promises would be to use the veil of corporation as a shield for fraud, which is against the common law of this State. *Pertuis,* 423 S.C. at 655, 817 S.E.2d at 282. It is the Individual Defendant's fraud that caused the contract to be breached, and as such they should be held individually liable.

1.2.2. <u>Varsity and Family Care Partners Are In Privity.</u>

Varsity and Family Care Partners are in privity with Dr. Pridgen because of the Acquisition Agreement signed between Colonial, Varsity, and Family Care Partners on December 22, 2015. (R. pp. 3000-3081). Section 8.1.4 of the Acquisition Agreement reads as follows:

> Buyer shall be responsible for the payments and benefits to be provided to Continuing Employees in accordance with Section 8.2, and continuation coverage for Continuing Employees in accordance with Section 8.2, as well as any other potential liability relating to any discontinuation of the employment of any Continuing Employee on or after the Closing.

(R. p. 3037). This is further established in the Management Services Agreement and the Membership Interest Control Agreement effective December 22, 2015. (R. pp. 2591-2849; pp. 3082-3092).

By signing the Acquisition Agreement, the Management Services Agreement, and the Membership Interest Control Agreement, Varsity and Family Care Partners took on all contractual obligations owed from Colonial to Colonial employees, physician and non-physician employees. These obligations included Dr. Pridgen's right to purchase an ownership interest in the practice. (See R. pp. 2552-2567). By agreeing to be responsible for the providing of Dr. Pridgen's contractual right, Family Care Partners and Varsity entered into privity with Dr. Pridgen.

It is established law in South Carolina that a third party who is financially obligated to provide for the execution of a contract between two original parties may be held in privity with the original parties. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* 320 S.C. 49, 53, 463 S.E.2d 85, 87 (1995); *see also Sentry Select Insurance Co., v. Maybank Law Firm, LLC,* 426 S.C. 154, 826 S.E.2d 270 (2019); *Fabian v. Lindsay,* 410 S.C. 475, 765 S.E.2d 132 (2014).

1.3. Varsity's Fraud.

The Court found that Dr. Pridgen "has not established any evidence of a fraudulent intent or act by Varsity." (R. p. 32). This ruling ignores the fact that Dr. Lowder and Watson each acted as representative mouthpieces for Varsity throughout Varsity's time as a majority investor in the medical practice. Varsity employee Alpern directed communication from Dr. Lowder and Watson about doctors seeking partnership, including to Dr. Pridgen and Dr. Baker, one of her male comparators who became partner during the timeframe at issue in this case. (See R. pp. 3725, 3726, 3728-3729, 3732-3734, 3766, 3769-3780). E-mails between Varsity officials, Dr. Lowder, and Watson reveal each to be executing the direction and commands of Varsity in operating the medical practice. (R. pp. 2568-2590; R. pp. 3722-3799). Dr. Lowder and Watson each acted as middle managers for the controlling party, Varsity. Watson went so far as to identify himself as a Varsity employee on his LinkedIn profile. (R. pp. 3623-3631).

Further, Dr. Lowder and Watson committed fraudulent acts related to the breach of Dr. Pridgen's contract. Dr. Lowder and Watson each made repetitive promises to Dr. Pridgen that she would purchase an ownership interest in the practice. (Watson Recording 34:56); (R. p. 1080, lines 7-14). Dr. Lowder and Watson knew that these promises were false at the time in which they were made. This is evidenced by Dr. Lowder and Watson repetitive efforts to stall, including cancelling meetings, shifting the buy-in requirements, purportedly adding buy-in requirements none of which were established in writing or by vote of any controlling entity(s), and shifting the buy-in time window of when Dr. Pridgen was able to become partner. (R. pp. 3093-3094; p. 3615).

Dr. Lowder and Watson knew that Dr. Pridgen was ignorant of their fraud, because it would obviously be impossible for Dr. Pridgen to be aware of their subjective, internal, and secret intentions to not fulfill their guarantees to Dr. Pridgen. Watson and Dr. Lowder intended for Dr.

Pridgen rely on their fraudulent statements so that she would remain employed by the practice, as it was understood from the beginning that an opportunity to purchase partnership was a condition of Dr. Pridgen's employment with the medical practice. (R. p. 3108). Dr. Pridgen justifiably relied on their fraudulent statements, to her detriment. Because Watson and Dr. Lowder were acting at the direction of Varsity, as Varsity mouthpieces in concert with Alpern and Dr. Katz during his time as Chief Medical Officer, when they made these fraudulent statements, the Court's ruling can not stand.

2. Defendants Made Verbal Representations to Dr. Pridgen.

Multiple representatives of the Defendants, including, Dr. Lowder, Watson, Lara, and Dr. Katz; on multiple occasions following the execution of the written contract, offered to guarantee Dr. Pridgen's right to purchase a partnership interest. (R. p. 1080, lines 7-14; p. 1112, line 11-p. 1113, line 25; p. 1226, lines 2-21; p. 3103; Watson Recording 16:18, 34:56). Dr. Lowder and Lara further promised that Dr. Pridgen's opportunity to purchase an ownership interest would be moved up in time and occur at eighteen months of employment. (R. p. 1448, line 12-p. 1450, line 8).

2.1. Defendants' Verbally Modified Dr. Pridgen's Contract.

Even assuming *in arguendo* that Dr. Pridgen's contract did not guarantee her a right to purchase a partnership interest, Defendants verbally modified Dr. Pridgen's contract to guarantee her such a right. Verbal modifications of a written contract are valid even when the contract expressly states that all changes must be in writing. *King v. PYA/Monarch, Inc.,* 317 S.C. 385, 390, 453 S.E.2d 885, 889 (1995). In one order, the Court agrees with this rule of law, stating "Plaintiff correctly points out 'a written contract may be modified by oral agreement even when the contract[] expressly states all changes must be in writing.'" (R. p. 13). However, while ruling on the same issue, at the same time, in the other Order the Court contradicts both itself and the law of

this State by stating "the Agreement contains a merger clause and any modifications to the Agreement were required to be in writing. Thus, the Agreement could not be orally modified." (R. p. 31). The law of *King* should govern in this case, as the Court has cited no case supporting its contradictory conclusion. Modification of a written contract must satisfy the fundamental elements of a valid contract. *Player v. Chandler,* 299 S.C. 101, 104-05, 382 S.E.2d 891, 893 (1989). In this case, the verbal modifications were a result of the meeting of the minds between the parties, were supported by adequate consideration, and were not precluded by the statute of frauds.

2.1.1. <u>There Was a Meeting of the Minds.</u>

The Court asserted that "there is no evidence of a meeting of the minds between the parties with regard to all essential terms of the alleged modification." (R. p. 13). This ruling is against the clear weight of the evidence in this case. "Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." *Rodarte v. University of South Carolina*, 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017). A meeting of the minds occurred with each of these offers. Defendants made objectively clear and unambiguous offers to guarantee Dr. Pridgen an opportunity to purchase partnership interest at thirty-six, and then eighteen months of employment. (R. p. 1080, lines 7-14; p. 1112, line 11 - p. 1113, line 25; p. 1226, lines 2-21; p. 1448, line 12 - p. 1450, line 8; p. 3103; Watson Recording 16:18, 34:56). Dr. Pridgen understood Defendants' offers, accepted them as they were presented, and thus created an objective meeting of the minds. The Court's ruling only affirms the Defendants' impermissible, concealed, subjective, after-the-fact intent to condition and qualify their offers of partnership to Dr. Pridgen. Such after-the-fact intent cannot be used to redefine the terms of an agreement. *Rodarte*, 419 S.C. at 603, 799 S.E.2d at 917-

18, quoting *N. Am. Rescue Prods., Inc. v. Richardson,* 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015). An understanding only presented after Dr. Pridgen's inducement into agreement cannot be the basis for a grant of summary judgement.

2.1.2. There Was Adequate Consideration.

The Court further asserts that no consideration was given for the verbal modifications. (R. p. 14). However, the evidence plainly shows Dr. Pridgen gave ample consideration. A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. *Armstrong v. Collins,* 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005). "Valuable consideration may consist of 'some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'" *Hennes v. Shaw,* 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012) *quoting, Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship,* 331 S.C. 385, 389, 503, S.E.2d 498, 499 (1945). A forbearance to exercise a legal right is valuable consideration to support a contract. *Caine & Estes Ins. Agency, Inc. v. Watts,* 278 S.C. 207, 209, 293 S.E.2d 859, 861 (1982). Specifically, declining to enforce a prior agreement, is proper consideration via forbearance in support of a future agreement. *See, Caine,* 278 S.C. at 210, 278, S.E.2d at 861.

Plaintiff's consideration is clear: the guarantee of an opportunity to buy a partnership interest in the practice. (R. p. 1080, lines 7-14; p. 1226, lines 2-21; p. 1448, line 12 - p. 1450, line 8; Watson Recording 34:56). Such consideration is of great financial benefit to Dr. Pridgen.

The Court cites to *Poole v. Incentives Unlimited, Inc.,* 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001) in finding that Dr. Pridgen gave no consideration, under the proposition that continued employment, where duties, position, and salary are left unchanged, is insufficient consideration for contract modification. (R. p. 14). The Court's interpretation, however, goes beyond the limit

of the law set forth by *Poole*. *Poole* states specifically that "we adopt the rule that when a covenant is entered into after the inception of employment, separate consideration, in addition to continued *at-will* employment, is necessary in order for the covenant to be enforceable." *Poole,* 345 S.C. at 382, 548 S.E.2d at 209 (emphasis added).

Dr. Pridgen is not an at-will employee, she has a written employment contract, thus *Poole* is inapplicable. (R. pp. 2552-2567). Dr. Pridgen agreed to continue her employment beyond the single year required by the contract by choosing to forego her legal right to provide notice and terminate her contract. (R. p. 1161, lines 4-6). Without such guarantees from Defendants, Dr. Pridgen could have chosen to exercise her legal right to terminate her contract of employment. Such forbearance is valid consideration for modification of Dr. Pridgen's contract. Additionally, Dr. Pridgen agreed to continue to allow Defendants to use her personally owned medical equipment, valued at approximately $25,000. (R. p. 1098, lines 9-21). Such consideration was to the detriment of Dr. Pridgen, as Dr. Pridgen gave forbearance to her right to sell the equipment for her own profit.

The Court's assertion that "no changed circumstances or positions of either party" results in no consideration is simply not in line with law of this state. Forbearance, which results in no changed circumstance or position because a party foregoes their right to engage in such a change, is a well-established, valid, fundamental element of consideration in South Carolina, and it is present in this case. *See, Hennes,* 397 S.C. at 399, 725 S.E.2d at 505; *Caine,* 278 S.C. at 209, 278, S.E.2d at 861; *Prestwick Golf Club, Inc,* 331 S.C. at 389, 503, S.E.2d at 499; and *General Elec. Co. v. Gate,* 273 S.C. 88, 91, 254 S.E.2d 305, 307 (1979). Additionally, the Court's ruling on this issue is internally contradictory. The Court found that "Plaintiff's Agreement does not contain a promise or guarantee that she will become an owner of Colonial." (R. p. 11). And yet on the issue

of verbal modifications the Court found that Defendants did not change its position by guaranteeing a right to purchase partnership. (R. p. 14). If Defendants did not guarantee a right to purchase partnership in Dr. Pridgen's contract, then they necessarily must have changed position by guaranteeing that right verbally at a later time.

Each of Defendants' oral modifications to the contract are supported by valid and adequate consideration. The Court's ruling on this issue is against the evidence of this case, and the law of this State. As such, it should be overturned.

2.1.3. The Statute of Frauds Does Not Apply.

Lastly, the Court asserts that the verbal modifications are barred by the statute of frauds. (R. p. 14). The law of this State, however, is clear; these verbal modifications do not fall within the purview of the statute of frauds. The statute of frauds is designed to protect against fraud and may not be set up as a protection or support of fraud. *Gardner v. Nash,* 225 S.C. 303, 310, 82, S.E.2d 123, 127 (1954). To bring a contract within the statute of frauds, as not to be performed within year, there must generally be negation of right to perform it within year. *McGehee v. South Carolina Power Co.,* 187 S.C. 79, 196 S.E. 538, 539 (1938). If there is a possibility of performance within a year, the agreement is not within the statute. *Joseph v. Sears Roebuck & Co.,* 224 S.C. 105, 111, 77 S.E.2d 583, 586 (1953). The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause. *Id.* "The statute of frauds, when it enacts that 'any agreement that is not to be performed within the space of one year, from the making thereof,' shall be in writing, means an agreement not to be performed in the space of a year, and expressly so stipulated." *Thompson v. Gordon,* 34 S.C.L. 196, 198-99 (Ct. App. 1848). "It must appear, within the agreement, that it is not to be performed till after the year, to make a note in writing necessary." *Id.*

None of the oral modifications between Dr. Pridgen and Defendants fall within the statute of frauds because none of the modifications were impossible to perform within one year. For example, the July 22, 2016 recorded meeting between Dr. Pridgen and Watson is dispositive on this issue. At around 33:00 of the recording, Dr. Pridgen asks, "When do you expect all of this to happen with me?" Watson responds, "It's up to you. We are definitely targeting 7-1-17" and there's reference to the Varsity guys being involved and that the next steps are looking at the end of 2016. Then, at around 34:54 of the recording, Dr. Pridgen expressly states, "I don't want to wait until next year to buy in." Watson responds, "Yeah, so we're making an exception for you and another doc [Dr. Baker]. I'd love to see your volumes come up. Shoot for like the end of the year, sometime 4th quarter." Dr. Pridgen confirms, "Let's do that then." Clearly, this was intended by Dr. Pridgen and Watson, the CEO, to be completed within the year, or at least by July 1, 2017, less than a year after their meeting on July 22, 2016.

Also, other verbal modifications guaranteed Dr. Pridgen the right to buy a partnership interest in the practice and guaranteed that the right would be granted at eighteen months of employment. (R. p. 1448, line 12-p. 1450, line 18). Such modifications were still subject to the original contractual term that expressly stated Dr. Pridgen's right to purchase a partnership interest could occur "at such other time as agreed to by the parties." (R. pp. 2552-2567).

Because Dr. Pridgen *could* have purchased her partnership interest within a year, the modifications are not barred by the statute of frauds. Furthermore, at no point in the process of modifying the contract did Dr. Pridgen ever negate her original, contractual right to potentially receive partnership interest at any moment, but at least by the 36th month of her employment. Additionally, in order for the statute of frauds to apply, Dr. Pridgen and Defendants would have had to of explicitly agreed that Dr. Pridgen was unable to receive partnership interest within a year.

Thompson, 34 S.C.L. at 198-99. There is zero evidence that such an agreement was ever made. Thus, summary judgement should not have been granted based upon an application of the statute of frauds.

2.1.4. <u>The Verbal Modifications and Promises Were Sufficiently Definite.</u>

The Court found that the terms of the verbal promises made to Dr. Pridgen are not specific enough to be enforceable. (R. pp. 14-15). This ruling is faulty. Dr. Pridgen prays reference to section 1.1 of this brief, as the law governing the definiteness of a written contract equally applies to the definiteness of a verbal modification, as such modifications must meet all the requirements of an otherwise valid contract. *Player,* 299 S.C. at 104-05, 382 S.E.2d at 893. Specifically, Dr. Pridgen reiterates that "[a] contract is not unenforceable for indefiniteness because its performance is, as to particular details left open to subsequent agreement of parties, especially where contract provides guidelines for subsequent agreement." *Aperm,* 290 S.C. at 447, 351 S.E.2d at 173 citing, *Touche Ross & Co.,* 162 Ga.App. 438, 292 S.E.2d 84. "For a contract to be binding… absolute certainty is not required, but only reasonably certainty." *Id.* citing 17 Am. Jur.2d *Contracts* Section 76 (1964).

The terms of the verbal modifications are clear: Dr. Pridgen was guaranteed an opportunity to purchase a partnership interest in the medical practice. Dr. Lowder assured Dr. Pridgen in January of 2016 that Dr. Pridgen would still be given an opportunity to purchase partnership. (R. p. 1112, line 11-p. 1113, line 25; p. 3103). In July of 2016, Watson further stated, "we are going to offer [Dr. Pridgen] partnership," and in multiple instances, guaranteed that Dr. Pridgen would be given an opportunity to purchase partnership. (Watson recording 16:18, 34:56). In another instance, Dr. Lowder and Lara both guaranteed to Dr. Pridgen that the time at which her opportunity to purchase partnership would accrue, would be moved up from thirty-six months of

employment, to eighteen months. (R. p. 1448, line 12-p. 1450, line 8). The terms of these modifications are clear: Dr. Pridgen would be given an opportunity to purchase a partnership interest. There is more than enough definiteness in the facts of this case to support Dr. Pridgen's right to present her case in front of a jury. The Court's ruling to the contrary, is out of step with the facts, and the law. As such, it should be reversed.

2.2. Defendants' Verbal Representations Create A Valid Claim Of Promissory Estoppel.

Notably, the Court did not discuss promissory estoppel in any manner separate from Dr. Pridgen's argument regarding a verbal modification of her contract. The Court simply references promissory estoppel in the context of all verbal agreements, and then proceeds to only analyze those verbal agreements through the lens of verbal modification. Verbal modification and promissory estoppel are separate theories of law, with different required elements and legal limitations. In the event one claim is found not viable, the other may continue to be valid even though it is based on the exact same verbal representation. For example, in this case, promissory estoppel is pled as an alternative to Dr. Pridgen's breach of contract claims. Even if no binding contract is found regarding ownership acquisition, Dr. Pridgen's promissory estoppel claim still stands on its own merit when viewed through the lens of an independent promissory estoppel analysis.

Promissory estoppel does not require all of the same elements as Dr. Pridgen's other contract and discrimination-based claims. "Notably, neither meeting of the minds nor consideration is a necessary element." *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013) *citing Satcher v. Satcher,* 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct. App. 2002). "Thus, in the interest of equity, the doctrine 'looks at a promise, its subsequent effect on the

promisee,' and where appropriate '*bars the promisor* from making an inconsistent disposition..." *Id.* (emphasis added).

The Supreme Court of South Carolina first used the term "promissory estoppel" in 1981. *Barnes*, 402 S.C. at 469, 742 S.E.2d at 11 *citing Higgins Constr. Co. v. S. Bell Tel. & Tel. Co.*, 276 S.C. 663, 665–66, 281 S.E.2d 469, 470 (1981).[5] In *Higgins,* the court explained the doctrine of promissory estoppel, stating, "an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice. *Id.*, 402 S.C. at 468-69, 742 S.E.2d at 11 *citing Higgins*, 276 S.C. at 665, 281 S.E.2d at 470. "Under the *Higgins* case and its progeny, the party asserting promissory estoppel must demonstrate: (1) a promise with unambiguous terms; (2) reasonable reliance upon the unambiguous promise; (3) foreseeability of the promisee's reliance; and (4) injury sustained in relying on the promise because of the promisor's inconsistent disposition." *Id.; Davis v. Greenwood Sch. Dist. 50,* 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005).

Here, Defendants made a promise with unambiguous terms, partnership. (See Watson Recording). There are several key points in the recording between Watson and Dr. Pridgen on July 16, 2016. The following are key points of the promises made to Dr. Pridgen during the recording:

- At around 15:50[11], Watson informs Dr. Pridgen that Dr. Lowder informed him that Dr. Lowder and Dr. Pridgen had talked.
- At around 16:15, Dr. Pridgen confirms that the Dr. Lowder had told her "that we are going to offer you partnership." Then, there is discussion about the numbers for patients seen per month.
- At around 17:00, Watson asks, "You saw my criteria, right?" They are looking at a physical document with the doctor's patient numbers.

[11] These are time stamps in the recording.

- At around 17:59, Watson says, "This is where you are. You can see where the 550 comes from. Stewart is lagging."

- At around 19:35, Watson says "We haven't quite figured out what the quality criteria is going to be... **You'll probably be in under the deck before this happens**."

- At around 22:18, Watson asks "So you're all in? Are you totally serious? Have you thought about how much you want to invest?" Dr. Pridgen discusses the buy in details, "Carlos and Luke told me they have a $1 million buy in." Watson says, "There's a formula that the Varsity guys have… that Alpern has…" "to determine how that applies here."

- At around 24:40, Watson "Varsity won't exit until they've got somewhere between 3 to 5 times return on money. So that's roughly what you can expect." At around 25:10, there is also a reference to the 10 or 15 times return on the money.

- At around 25:30, Watson says that he met with Alpern the night before their meeting, which would have been on July 15, 2016.

- At around 25:42, Watson says that he told Alpern that Dr. Pridgen definitely want to buy in and there's one other doctor, Dr. Baker (who was later made partner shortly thereafter) has asked about it.

- At around 26:56, Watson says that he can give Dr. Pridgen the power point, materials, and the financials [from Paul Miller, the Chief Financial Officer] to Dr. Pridgen.

- At around 33:00, Dr. Pridgen asks, "When do you expect all of this to happen with me?" Watson responds, "It's up to you. We are definitely targeting 7-1-17" and there's reference to the Varsity guys being involved and that the next steps are looking at the end of 2016.

- At around 34:36, Watson describes the value of partnership and acknowledges the benefit of Dr. Pridgen buying sooner rather than later. Watson says, "It's like a stock… It's better to buy in now… The earlier you buy in the better off you are."

- At around 34:54, Dr. Pridgen expressly states, "I don't want to wait until next year to buy in." Watson responds, "Yeah, so we're making an exception for you and another doc [Dr. Baker]. I'd love to see your volumes come up. Shoot for like the end of the year, sometime 4th quarter." Dr. Pridgen confirms, "Let's do that then."

- At around 48:22, "How much can I invest? Watson responds, "$10,000-$100,000. "In 9 months, you can invest again another $100,000." "It's cumulative."

(See also R. p. 1614, line 5 - p. 1654, line 20; p. 1655, line 5-p. 1665, line 11; pp. 2568-2583). Dr. Pridgen expectedly, foreseeably, and reasonably relied on their promises that she would be partner. (Id.; see also R. p. 1068, lines 3-6; p. 26, lines 4-6; p. 1088, lines 3-8; p. 1089, lines 18-21; p. 1090,

lines 1-2 ["Clay offered me partnership as an enticement for me to bring my practice."]; p. 1090, line 7; p. 1092, lines 9-p. 1093, line 18; p. 1096, lines 18-24; p. 1107, line 19-p. 1108, line 3; p. 1112, line 11-p. 1113, line 25["You're still up for partnership if you want it. Nothing is going to change."]; p. 1119, line 20-p. 1120, line 7; p. 1121, lines 19-22; p. 1125, lines 7-9; p. 1133, lines 3-6). Dr. Pridgen, to date, is not a partner. Dr. Pridgen has been damaged because of her reliance. (R. p. 1164, line 19-p. 1172, line 2). As such Dr. Pridgen does have a valid promissory estoppel claim and the Court's ruling to the contrary should be reversed.

2.3. Defendants' Verbal Representations Create A Valid Claim Of Negligent Misrepresentation.

The Court justified its dismissal of Dr. Pridgen's negligent misrepresentation claim by stating "the underlying representation that Dr. Pridgen would be made an owner of Colonial in the future is merely an unfulfilled promise or statement of future event, which is not enforceable as a matter of law." The facts of this case, however, do not support such a conclusion. See *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) citing *West v. Gladney,* 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

Defendant Dr. Lowder, who was the managing partner and Chief Medical Officer at the time he falsely represented that opportunity to purchase partnership was a condition of the merger of Dr. Pridgen and Defendant's practices when Dr. Pridgen became an employee of the medical practice in 2013. (R. p. 3615). Pridgen 0202). That false representation was memorialized in Term 15 of Dr. Pridgen's Employment Agreement. (R. pp. 2552-2567). That false representation was renewed on multiple occasions, including by Watson when he was the CEO. (R. p. 1226, lines 2-21; p. 1448, line 12-p. p. 1450, line 8; Watson Recording 34:56). These repeated false representations occurred after Defendants had begun to develop a scheme designed to create pretextual reason to deny Dr. Pridgen the right to purchase partnership that was being guaranteed

to her. (R. pp. 3722-3799). Thus, evidence exists which shows that Defendants knew the representations to be false when repeated, and Defendants' false representations related to a present or pre-existing fact. As a result, the Court's ruling on this issue is defective and should be reversed.

2.4. Defendant Varsity May Be Held Liable For Verbal Representations.

The Court found that Dr. Pridgen "never communicated with any Varsity employee or official." (R. p. 32). This ruling ignores the fact that Dr. Pridgen had regular contact with Dr. Lowder and Watson, who each acted as representative mouthpieces for Varsity throughout Varsity's time as a majority investor in the medical practice. (See R. pp. 3722-3799). Varsity employee Alpern directed communication from Dr. Lowder and Watson to doctors seeking partnership, including to Dr. Pridgen and Dr. Baker, one of her male comparators who became partner during the timeframe at issue in this case. (See R. pp. 3725, 3726, 3728-3729, 3732-3734, 3766, 3769-3780). E-mails between Varsity officials, Dr. Lowder, and Watson reveal each to be executing the direction and commands of Varsity in operating the medical practice. (R. pp. 2568-2590; pp. 3722-3799). Dr. Lowder and Watson each acted as middle managers for the controlling party, Varsity. Watson went so far as to identify himself as a Varsity employee on his LinkedIn profile. (R. pp. 3623-3624). The Court's ruling is not in line with the facts of this case. When Varsity representatives and self-identified Varsity employees make verbal representations to Dr. Pridgen, Varsity should be held liable for those statements. Thus, the Court's ruling should be reversed.

3. <u>Varsity Is Liable For Violations Of Title VII And The Equal Pay Act.</u>

Varsity was a joint employer of Dr. Pridgen, or, in the alternative, an integrated employer of Dr. Pridgen. This issue of joint employment and integrated employment was recently before the District of South Carolina in *Taylor v. Fluor Corp.* The Court held as follows:

> Finally, Defendants object to the Report generally by arguing that Fluor Corporation is not a proper party to this employment discrimination case. (ECF No. 76 at 20–21.) Defendants argue that Fluor Corporation did not act as an employer to Plaintiff or control or direct her employment in any way, and that Fluor Corporation is not integrated with Fluor Government Group International, Inc.—the source of Plaintiff's W-2 statements—under the integrated employer test. (*Id.*) The Magistrate Judge correctly found that Defendants' motion for summary judgment failed to address either the integrated employer test or the joint employer test, and recommended denying the motion for summary judgment on this basis. (*See* ECF No. 73 at 34–36 (citing *Dunlap v. TM Trucking of the Carolinas, LLC*, 288 F. Supp. 3d 654, 664-65 (D.S.C. 2017)).) Issues raised for the first time in objections to a magistrate judge's recommendation are deemed waived. *Harris v. Astrue*, No. 2:11-CV-01590-DCN, 2012 WL 4478413, at *5 (D.S.C. Sept. 27, 2012) (citing *Marshall v. Chater,* 75 F.3d 1421, 1426 (10th Cir. 1996)). Defendants' invocation of the integrated employer test for the first time in their objections is improper and the objection is overruled. However, even if the Court were to consider the merits of this objection it would prove unavailing. There is sufficient record evidence to create a genuine issue regarding Fluor Corporation's involvement in factual matters material to the case, to wit: (1) the policies at issue are Fluor Corporation's corporate policies; (2) the employee reporting hotline is operated by Fluor Corporation; (3) employees of the Fluor parent entity seamlessly transition between subsidiary entities; and (4) there are interlocking corporate directors shared by Fluor Corporation and Fluor Government Group International, Inc. (*See* ECF No. 78 at 21–22.) Thus, Defendants are not entitled to summary judgment on the issue of dismissing Fluor Corporation as a party defendant in any event.

Taylor v. Fluor Corp., No. CV 6:17-1875-BHH, 2019 WL 4727464, at *4 (D.S.C. Sept. 27, 2019). Similarly, here, the record shows that Varsity is not entitled to summary judgment on the issue of

dismissing Varsity as a party defendant. (See R. pp. 1499-1758; pp. 1759-1962; pp. 1963-2169; pp. 2290-2369; pp.1055-1498; pp.2170-2289; Watson Recording; pp. 3722-3799; pp. 2984-2999).

3.1. Varsity was a Joint Employer of Dr. Pridgen. [12]

Courts have properly held two employers jointly liable for a Title VII violation. *See, Magnuson v. Peak Tech. Servs., Inc.,* 808 F.Supp. 500, 507 (E.D.Va. 1992), *aff'd,* 40 F.3d 1244 (4th Cir. 1994); *Butler v. Drive Automotive Industries of America, Inc.,* 793 F.3d 404, 409 (4th Cir. 2015) ("We now hold that the joint employment doctrine is the law of this Circuit"). The joint employment doctrine prevents those who effectively employ a worker from evading liability by hiding behind another entity, such as a staffing agency. *Butler,* 793 F.3d at 410, *citing Sibley Mem'l Hosp. v. Wilson,* 488 F.2d 1338, 1341 (D.C. Cir. 1973). "A defendant may be held liable under Title VII if it (1) fits within the "employer" definition of Title VII and (2) 'exercise substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment.'" *Williams v. Grimes Aerospace Co.,* 988 F.Supp. 925, 934 (D.S.C. 1997), *citing Magnuson,* 808 F.Supp. at 507.

> "In determining 'employer' status the court is guided by the "broad, remedial purpose of Title VII which militates against the adoption of a rigid rule strictly limiting 'employer status' ... to an individual's direct or single employer.'"

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[12] Given the lack of expansion and use of the Integrated Employer theory of law in this jurisdiction, Appellant has chosen not to brief her arguments on the Integrated Employer theory in this brief. Appellant does, however, maintain her argument that under the test laid down in *Hukill v. Auto Care, Inc.,* Varsity is an integrated employer of Dr. Pridgen and thus liable for the civil rights violations committed against her. *Hukill v. AutoCare, Inc.,* 192 F.3d 437, 442 (4th Cir. 1999) (*abrogated on other grounds by Arbaugh v. Y & H Corp.,* 546 U.S. 500, 163 L.Ed.2d 1097 (2006)) citing *Armbuster v. Quinn,* 711 F.2d 1332, 1337-38 (6th Cir. 1983). For the time period at issue, Varsity, Family Care Partners, and Colonial Family Practice each share common management, have an interrelation between operations, have centralized control of labor relations, and have a degree of common ownership and financial control; thus, satisfying the elements needed under an Integrated Employer test. *Id.* Appellant encourages the Court to further adopt the Integrated Employer theory of law and apply it in this case.

Id. at 934-935, *citing Magnuson,* 808 F.Supp. at 508.

To determine employer status, the Fourth Circuit in *Butler* has adopted a nine-factor hybrid test. Notably, while the Court does cite to *Butler,* the Court erroneously cites to a previous eleven factor test, which the court in *Butler* explicitly rejected as follows:

> Accordingly, we adopt the hybrid test. We find, however, that our previous statements of the hybrid test, involving the analogous but legally distinct independent contractor context, do not adequately capture the unique circumstances of joint employment. The factors used in *Spirides* and *Cilecek* include considerations that are irrelevant to the joint employment context. Drawing on our existing precedent and joint employment cases in other circuits, we now articulate a new set of factors for courts in this Circuit to use in assessing whether an individual is jointly employed by two or more entities:
>
> (1) authority to hire and fire the individual;
>
> (2) day-to-day supervision of the individual, including employee discipline;
>
> (3) whether the putative employer furnishes the equipment used and the place of work;
>
> (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes;
>
> (5) the length of time during which the individual has worked for the putative employer;
>
> (6) whether the putative employer provides the individual with formal or informal training;
>
> (7) whether the individual's duties are akin to a regular employee's duties;
>
> (8) whether the individual is assigned solely to the putative employer; and
>
> (9) whether the individual and putative employer intended to enter into an employment relationship.

> We note that none of these factors are dispositive and that the common-law element of control remains the "principal guidepost" in the analysis. Indeed, consistent with our opinion in *Cilecek*, courts can modify the factors to the specific industry context. See *Cilecek v. Inova Health System Services,* 115 F.3d 256 at 261 (4th Cir. 1997) (refashioning factors for a controversy arising in a hospital setting).

Butler, 793 F.3d at 410; (R. p. 27). The *Butler* nine-factor test was reaffirmed as the presiding precedent in *Greene v. Harris Corp.,* 653 F. App'x 160, 164 (4th Cir. 2016).

The Court determined that "Plaintiff has not presented any competent evidence to contradict Varsity's sworn testimony that it never had any employees." (R. pp. 26-27). The Court's determination is in contradiction with its own further discussion as the Court then proceeds in its Order to discuss the actions of various "Varsity officials" and "Varsity representatives." (R. pp. 27-28).

The Court's determination is also contradictory with the evidence of this case. E-mails between Family Care Partners Management, Varsity, and Colonial Family Practice reveal that Varsity employed a variety of individuals. This can be seen, in part, by the email addresses used by these employees. The Court asserted that the email addresses in question where listed under the domain "@familyhealthcarepartners.com." (R. p. 27). However, the emails in question are as follows:

- David Alpern, DA@varsityhealthcarepartners.com;
- Michael Jablon, MJ@varsityhealthcarepartners.com;
- Kenton Rosenberry, KR@varsityhealthcarepartners.com;
- Steven Boyd, SKB@varsityhealthcarepartners.com;
- Narissa Reed, NR@varsityhealthcarepartners.com; and
- Amy Maser, AM@varsityhealthcarepartners.com.

(R. pp. 3638-3697) (emphasis added). Varsity issued publications describing the history and credentials of their employees. (R. pp. 3638-3697). The Court further stated that "Plaintiff alleges 'Watson is… a self identified Varsity employee.' But the evidence she cites does not support the

allegation." (R. p. 27). To the contrary, Dr. Pridgen has provided evidence that Tom Watson identified himself, in writing, to the public, as a Varsity employee on his own LinkedIn profile. (R. pp. 3113-3614).

Dr. Pridgen respectfully disputes the Court's determination that Varsity was not a joint employer of Dr. Pridgen. Varsity's direct and overwhelming influence over the medical practice that Varsity was the majority owner of for several years, makes Varsity a joint employer over Dr. Pridgen, an employee of the medical practice. This is evidenced by Watson's testimony. Watson testified:

> A...I wasn't the decision maker. The chief medical officer and the board would have been, not me.
>
> Q. And you were on the board?
>
> A. I was on the board, but I didn't have the controlling voting rights. I could have said whatever I wanted, it wouldn't have mattered.
>
> Q. And who do you consider to have the controlling voting rights?
>
> A. Varsity had controlling voting rights on the board.

(R. p. 1668, line 18-p. 169, line 2).

Discovery also uncovered that these representatives met with the others, in an official capacity, in a multi-day New York City meeting[13] to give instruction to Colonial Family Practice and Family Care Partners on issues such as: billing, collections, M.D. communication, acquisitions, financing plans, auditing, and more. (R. pp. 3638-3698).

[13] Factual disputes remain over the semantics of what this meeting of Board members amounts to. Defendants zealously assert this New York City meeting was not an official Board meeting where the Board should have voted on Dr. Pridgen becoming a partner. Dr. Pridgen's position is that the Board members still met together as a body with almost all of the Board members present around the time of their regularly scheduled Board meeting for a multi-day business meeting where they discussed and made decisions that materially impacted Dr. Pridgen's employment with the practice. Thereby, for all intents and purposes, that meeting was a Board meeting as relevant to Dr. Pridgen's claims that partnership has been unlawfully withheld.

There are several other relevant pieces of information that reveal Varsity as a joint employer of Dr. Pridgen, during the time frame relevant to this analysis. Varsity was engaged in the process of addressing complaints and concerns raised by other doctors. (R. p. 3728). Varsity maintained records related to Dr. Pridgen's employment. (R. p. 3666; p. 3670). Varsity sought to actively participate in the employment of the doctors, such as Dr. Pridgen, as it maintained documents related to its "recruitment" and "acquisition" of other doctors. (R. pp. 3702-3721).

The Court found that Dr. Pridgen "has not presented any evidence that Varsity officials acted outside their capacity as FCP Holdings Board members." (R. p. 28). Dr. Pridgen appeals that finding. Varsity owned the majority of the practice and thereby had the controlling interest in the medical practice, run, in part, by FCP Holdings. (See R. p. 1845, lines 15-25). When Varsity met with individuals of FCP Holdings and Colonial Family Practice in New York City, they met to give directions to Colonial Family Practice and FCP Holdings and make decisions about the management and financial control of the practice where Dr. Pridgen worked. (R. pp. 3638-3698). At all the relevant times, Varsity was the party at the top of this hierarchy of entities managing the practice where Dr. Pridgen worked, and it was in control for a significant period of Dr. Pridgen's employment relevant to this lawsuit.

Telling evidence of Varsity's control over the medical practice, and their joint employment of Dr. Pridgen is their control over who would and would not be given an opportunity to purchase a partnership interest in the practice. In regard to a male doctor's request for an opportunity to purchase partnership, David Alpern, a Varsity employee, stated "that's something that predates us, **but we can solve**." (R. p. 3728)(emphasis added). In fact, David Alpern, a Varsity employee, set down instructions on who Varsity would and would not permit to purchase partnership interest; **"equity is reserved for our key players who are both productive in dollar collections and**

'influencers'; we don't want to had it out to everyone." (R. pp. 3728-3729)(emphasis added). The entity defendants wanted Dr. Baker, a male doctor, to become a partner and they made it happen, while intentionally excluding Dr. Pridgen, who was eligible for, and was contractually required to be, made partner.

The Court's statement of "even assuming that these instances actually involved Varsity, it is clear that these instances did not involve Plaintiff" just does not hold up against the evidence. (See R. pp. 3722-3799). Of course, determining who would become partner concerns Dr. Pridgen and her employment, it was a term in her contract. (See R. p. 2562). When Varsity gave directions regarding billing, collections, and M.D. communication, it concerned Dr. Pridgen, because Dr. Pridgen is an M.D. who deals with billing and collections in her everyday practice of medicine. Varsity involved Dr. Pridgen when Varsity took on the task of addressing concerns of doctors in the practice like Dr. Pridgen. Varsity involved Dr. Pridgen when Varsity decided to maintain employment records on Dr. Pridgen.

There can be no clearer sign of the joint nature of these entity defendants than the fact that every deponent who has testified in this case has testified that the entities are intertwined with one another during the time period at issue. For example, Dr. Soto, who is one of the partners, testified as follows:

> A. When Varsity bought us, we had no say or at least I felt like we had no say, so no.
>
> Q. Have you personally ever sought to take action towards Dr. Pridgen becoming a partner?
>
> A. It wasn't my place to do anything. I couldn't make decisions on anything. I don't think it mattered if I would have done anything.
>
> . . .
>
> Q: If you're not the decision marker, who do you attribute the decision maker to be with regard to Dr. Pridgen becoming partner?

*Objections from Defense Counsel

> A: The decision makers, I guess at that moment, I can't remember if Tom Watson was still there, which was representing probably Varsity, And -- and the CEO for the Family Care Partners at that time, I would think that he would probably would be the one to make decisions. Honestly, I don't even know who would make decisions. Dave Alpern? I don't know if Dave Alpern had anything to do with it. I don't really honestly don't know. All I -- when we went to the -- to meetings with them, it was informative, it was never to ask me questions, what did I think or, you know, what to do.
>
> Q. And describe for me the meetings that you're referring to in that last response.
>
> A. The meetings were whatever they had a -- meetings for us to come and find out what was happening with the practice.
>
> Q. Who is the "they" that you're referring to in your testimony?
>
> A. I guess whoever was in charge of Family Care Partners at the moment.
>
> Q. Who do you believe was in charge of Family Care Partners at the time of those meetings?
>
> Varsity Objection
>
> A. The Varsity people and Clay Lowder.

(R. p. 2198, line 3-p. 2200, line 4). Dr. Soto described that the practice was "sold to Varsity" and that Varsity controlled the business. (R. p. 2200, lines 24-35; p. 2205, lines 1-2; p. 2215, lines 12-19). When asked how he found about that Dr. Baker, a male physician comparator to Dr. Pridgen, was becoming a partner, Dr. Soto answered "That was during the time of Varsity so I guess Varsity announced that they were going to allow him to become a partner, but that's probably all I can tell you." (R. p. 2226, lines 22-25). Dr. Lowder's testimony similarly evidences that intertwined nature of these entities for the decision of whether Dr. Pridgen became a partner. (See R. p. 1781, line 14-p. 1792, line 23; p.1825, line 9-p. 1829, line 19; p. 1841, line 11-p. 1842, line 24; p. 1844, line 5-p.1846, line 18). Dr. Lowder described it as follows:

> Q. From the transaction with Varsity, what benefit did the partners of Colonial receive?
>
> A. What do you mean "benefit"?
>
> Q. Financial in nature?
>
> A. Yeah. Well, they kind of purchased part of our practice and like -- they purchased like 61 percent of our practice. I'm sorry, they purchased the whole practice, and then we rolled back 39 percent. I'm a doctor so I don't know financial, but they ended up owning 61 percent and we owned 39 percent, the partners did.

(R. p. 1845, lines 15-25).

> Q. Which doctor is the most recent that has -- at Colonial that has been designated as a partner?
>
> A. I can't remember which one was last, Dr. Katz or Dr. Baker.
>
> Q. When Dr. Katz and Dr. Baker became partners, was there a vote?
>
> A. I don't remember.
>
> Q. When Dr. Katz and Dr. Baker became partners, who were the decision-makers?
>
> A. I guess the board. I guess Dave Alpern and Tom Watson and the board.
>
> Q. And I think you've identified Dave Alpern as the chairman. What was Tom Watson's role at the time of that decision-making?
>
> A. He was the CEO.
>
> Q. Would that be of Varsity?
>
> A. I think he was CEO of Family Care Partners.

(R. p. 1789, lines 2-18). A weighing of the relevant factors reveals that the Court's determination of no joint employment relationship cannot stand.

Additionally, the Fair Labor Standards Act ("FLSA") analysis of joint employers is applicable here because the EPA is an amendment to the FLSA. Varsity attempts to circumvent its liability here to the disservice of the broad and protective coverage that Congress sought to ensure

when passing the FLSA and the EPA. The Fourth Circuit recently and assertively articulated such concerns as follows:

> Focusing first on the relationship between putative joint employers is essential to accomplishing the FLSA's "remedial and humanitarian" purpose. *Purdham v. Fairfax Cty. Sch. Bd.*, 637 F.3d 421, 427 (4th Cir. 2011) (internal quotation marks omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944)). Indeed, a worker who performs services for two or more entities that are "not completely disassociated" with respect to his work may not amount to an "employee" protected by the FLSA when his relationship to each entity is considered separately, but may come within the statutory definition of an "employee" when his relationships to all of the relevant entities are considered in the aggregate. By ignoring the relationships *between* and *among* these entities vis-à-vis the worker, the framework deployed by the district court erroneously failed to take account of a worker's *entire* employment when considering whether he or she is covered by the FLSA. This approach departs from the framework we set forth in *Schultz* and risks creating significant gaps in the broad, protective coverage Congress sought to ensure in adopting the FLSA.

Hall v. DIRECTV, LLC, 846 F.3d 757, 768 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 635, 199 L. Ed. 2d 526 (2018).

Regulations promulgated to enforce the FLSA state that a joint employment relationship generally will be considered to exist in situations such as:

> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 306 (4th Cir. 2006) (quoting 29 C.F.R. § 791.2(b)).

In *Schultz*, the Fourth Circuit established a two-step framework for determining whether a defendant may be held liable for an alleged FLSA violation under a joint employment theory. *Hall,* 846 F.3d at 767 *citing Schultz*, 466 F.3d at 305–09. Under the two-step framework, the court must first determine whether the defendant and one or more additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of the plaintiff's work. *Id.*; *see also Salinas v. Commercial Interiors, Inc.,* 848 F.3d 125, 139-42 (4th Cir. 2017).

"The second step of the analysis—which asks whether a worker was an employee or independent contractor for purposes of the FLSA—depends in large part upon the answer to the first step." *Hall,* 846 F.3d at 767. Namely, if the court determine that the defendant and another entity codetermined the key terms and conditions of the worker's employment, then the court must consider whether the two entities' *combined* influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor. *Id.* Here, the independent contractor analysis is not applicable, but the remainder of the two-step framework is a necessary application to this case. The facts of this case fit within the description of circumstances (2) and (3) of 29 C.F.R. § 791.2(b).

Beginning with scenario (2), Colonial Family Practice and Family Care Partners are both acting directly in the interest of Varsity. Varsity's admitted primary purpose is to exist as an investor in the commonly shared medical practice. (R. p. 418). When Colonial Family Practice and Family Care Partners profit, so does Varsity. (R. pp. 3000-3081). When Colonial Family Practice and Family Care Partners loses money, so does Varsity. (R. pp. 3000-3081). Their interests are directly aligned. Thus, Varsity fits neatly within the description of circumstance (2) and is a joint employer of Dr. Pridgen.

Additionally, Dr. Pridgen's case fits within scenario (3) because Colonial Family Practice and Family Care Partners are controlled by and under the common control of Varsity during the time frame relevant to this analysis. Varsity, Colonial Family Practice, Family Care Partners, and individual owners entered into a comprehensive Acquisition Agreement. (R. pp. 3000-3081). Under this agreement, Varsity gained financial and ownership control of a significant portion of the medical practice. In doing so, Varsity gained a significant degree of control over the operations of the medical practice, as run by Colonial Family Practice and Family Care Partners. This control can be seen in e-mails related to a New York City meeting between all three defendant entities in which Varsity exercised substantial power in decision making on issues such as billing, collections, M.D. communication, acquisitions, financing plans, auditing, and more. (R. pp. 3638-3698).

Varsity further exercised control over Colonial Family Practice and Family Care Partner officers in directing the day to day communication with M.D.'s and in the selection of M.D.'s for ownership buy-in. (See R. pp. 3725, 3726, 3728-3729, 3732-3734, 3766, 3769-3780). Varsity officials, not Colonial Family Practice or Family Care Partners, actually made direct offers for partnership in the practice to other M.D.'s including Dr. Katz. (R. pp. 3109-3112). By Varsity's own admission, its sole purpose was to exist as an entity that controls and in part owns the medical practice operated by Colonial Family Practice and Family Care Partners. (R. p. 418). Varsity fits neatly within the description of circumstance (3) and is a joint employer of Dr. Pridgen. Thus, when reviewing the facts of this case and the applicable law, the Court's ruling should be reversed.

3.2. <u>Varsity Discriminated Against Dr. Pridgen Because She Is Female.</u>

The Court did not address the issue of discrimination against Dr. Pridgen in the December 20, 2019 Orders, as the Court held that Varsity did not employ Dr. Pridgen and the Colonial Defendants' Partial Motion for Summary Judgment did not address these two claims. (R. pp. 20-

34; pp. 7-19). Had the Court reached the portion of analysis necessary to determine whether or not Dr. Pridgen was discriminated against, the facts and law combine to reveal that Dr. Pridgen was the subject of persistent, severe, and damaging discrimination on the basis of her status as a female.

To assert a claim of pay discrimination under the EPA, the plaintiff must show: (1) her employer paid different wages to members of the opposite sex, (2) that the other employees hold jobs that require the same skill, effort, and responsibility; and (3) that such jobs are performed under similar working conditions. 29 U.S.C. § 206(d); *Gustin v. W. Virginia Univ.*, 63 F. App'x 695, 698 (4th Cir. 2003) *citing Brinkley v. Harbour Recreation Club*, 180 F. 3d 598, 613 (4th Cir. 1999) (*citing Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)). The plaintiff must also identify a particular male 'comparator' for purposes of the inquiry. *Strag v. Bd. of Trs., Craven Cmty. Coll.*, 55 F.3d 943, 948 (4th Cir.1995) (*citing Houck v. Va. Polytechnic Inst.*, 10 F.3d 204, 206 (4th Cir.1993)). Similarly, to establish a *prima facie* case of wage discrimination under Title VII, a plaintiff must show: (1) that she is a member of a protected class; (2) she was paid less than an employee outside the class; and (3) the higher paid employee was performing a substantially similar job. *Davis v. S.C. Dep't of Health & Envtl. Control*, No. 3:13-CV-02612-JMC, 2015 WL 5616237, at *3 (D.S.C. Sept. 24, 2015).

Dr. Pridgen is a female. Dr. Pridgen is not a partner. There are ten partners of the practice. All of the partners are male: Dr. John Baker, Dr. Mitchell Grunsky, Dr. Jason Leonard, Dr. Clay Lowder, Dr. Thomas Lucas, Dr. Christopher Mahr, Dr. Edward Myers, Dr. Carlos Soto, Dr. Ike Stewart, and Dr. David Whaley.[14] (R. p. 1800, lines 10-12). Each of these male physicians are comparators because they are peer physicians working at the same medical practice. Dr. Pridgen is paid less than the male partners. (See R. p. 3104-3107; see also pp. 2850-2968; pp. 2452-2532;

[14] Additionally, Dr. Katz was a comparator during his time that he held an ownership interest.

pp. 2533-2551; pp. 2370-2451). Accordingly, Dr. Pridgen established the requisite elements of her discriminatory pay based on sex claims.

Because Defendants have asserted that Dr. Pridgen was not denied partnership on the basis of her sex, Dr. Pridgen had to put forth evidence showing the Defendants' purported non-discriminatory reasons for denying her partnership are pretext. Dr. Pridgen has put forth both direct and circumstantial evidence supporting her discrimination claims.

There is a piece of evidence, that in and of itself, establishes a triable discrimination case. Watson's November 19, 2016 email to Dr. Lowder and the CFO entitled "Pridgen Tie-Off" with an importance designation as a high level of importance, states, "Clay, let me know your decision on Pridgen for buy-in. **My *bias* is** to stick to the criteria which has 550 as the floor for the monthly visits average factor. As you know, Jess has all the detail you need in the daily file to keep an eye on her." (R. p. 2581; see also R. p. 1663, line 21-p. 1678, line 8)(emphasis added).

This piece of evidence is part of the dialogue of emails about considering Dr. Baker, a male physician, and Dr. Pridgen, a female physician, for partnership. Dr. Baker was made a partner; Dr. Pridgen was not based on her sex. Exceptions were made for Dr. Baker. No exceptions were made for Dr. Pridgen, to the contrary, more and more arbitrary and unwritten requirements were added to Dr. Pridgen as pretextual reasons why she has been denied partnership. This is direct evidence of Defendants discriminating against Dr. Pridgen. Bias is synonymous with discrimination. It is a jury issue to determine whether this "bias" violated Dr. Pridgen's rights under Title VII and the EPA.

Evidence abounds undermining the Defendants arguments that Dr. Pridgen is appropriately denied partnership. Dr. Pridgen has contractual rights to and promises of partnership that have been willfully ignored while Dr. Baker and Dr. Katz, both male physicians, received ownership

interests. Watson and Dr. Pridgen's July 16, 2016 meeting recording confirms that both Dr. Pridgen and Dr. Baker were going to be made partner, yet only Dr. Baker was made partner. (See recording; see also R. p. 1614, line 5-p. 1654, line 20).

Dr. Pridgen's communications with Watson, Dr. Lowder, and Dr. Katz memorialize the continual dialogue that centered around Dr. Pridgen becoming partner, yet the Defendants have continually shifted reasons as to why Dr. Pridgen is not a partner. Sometimes, the argument from Defendants has been that Dr. Pridgen must meet a certain quota of patients seen per month; yet, Dr. Pridgen met such expectations and such expectations were not applied to Dr. Baker, the male physician up for partnership around the same time as Dr. Pridgen. (See R. pp. 3722-3799). Sometimes Dr. Pridgen was told she had to see 500 patients a month. (Id.). Sometimes, Dr. Pridgen was told she had to see 550 patients a month. (Id.). Yet, the discovery production indicates that once this purported quota requirement was brought to Dr. Pridgen's attention, she met this arbitrary threshold, with the exception of the month of Dr. Pridgen's multi-week honeymoon. (R. pp. 2969-283).[15]

Consistently, Dr. Lowder, Dr. Katz, Watson, and Dr. Soto all confirmed in their testimony that no requirements for partnership have even been established, as applicable to Dr. Pridgen. (See Depositions produced herewith, i.e. R. p. 1554, line 20 -p. 1555, line 4).[16] These arbitrary and

[15] May 2016 - 648 visits, June 2016 - 701 visits, July 2016 - 635 visits, August 2016 - 646 visits, September 2016 - 339 visits (honeymoon), October 2016 - 635 visits, November 2016 - 621 visits, December 2016 - 650 visits, January 2017 - 811 visits, February 2017 - 665 visits, March 2017 - 1015 visits, April 2017 - 782 visits, May 2017 - 781 visits, June 2017 - 765 visits, July 2017 - 630 visits.

[16] Q. And what barriers, if any, were there to Dr. Pridgen becoming a partner?

A. Well, so the first was, I think, when she and I talked, she was not at the membership, you know, the most basic thing, she wasn't hitting the -- the patient count per month, which was not necessarily all that well defined either. That was sort of in flux. Somewhere around the 500 level. But I think we were trying to set it higher than that. (Watson 56:20-57:4).

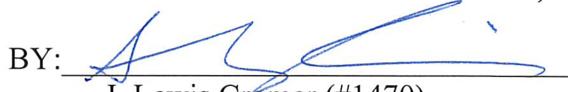
shifting reasons given by Defendants evidence the real reason behind why Dr. Pridgen is not a partner, which is because she is a female. This is a triable case of discrimination.

CONCLUSION

Appellant Dr. Kaoru Pridgen respectfully asks this Honorable Court to Reverse the holdings of the Circuit Court issued in the December 20, 2019 Orders and Remand this case for the reasons discussed above and in the record before the Court.

Respectfully Submitted,

CROMER BABB PORTER & HICKS, LLC

BY: 

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